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No. 84-1515

In the Supreme Court of the United States

OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION, ET AL.,
PETITIONERS

v.

TRI-STATE MOTOR TRANSIT CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR THE FEDERAL PETITIONERS

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Respondents' effort to divert attention from the impact of the decision below on the Hobbs Act's principle of finality warrants a brief response.

1. It is not the case, as respondents argue (Br. in Opp. 10), that the Hobbs Act issue is "insubstantial" and was decided in a fashion that "accords with the law in the other circuits which have ruled." Quite the opposite. The United States Court of Appeals for the District of Columbia Circuit (one of the courts upon whose decisions respondents rely) recently commented (*Aluminum Co. of America* v. *ICC*, No. 83-1730 (May 10, 1985), slip op. 11) on

> the apparent conflict in the expression of our cases on the question whether, in the course of an appeal from an agency decision applying a rule to a specific set of facts, we may entertain a challenge to the rule itself

after the jurisdictional deadline for direct review of the rule has expired. See *Network Project* v. *FCC,* 511 F.2d 786, 789 n.1 (D.C. Cir. 1975) (rule may be challenged in such circumstances); *Asphalt Roofing Manufacturers Association* v. *ICC,* 567 F.2d 994, 1005 (D.C. Cir. 1977) (rule may not be challenged in such circumstances); *Investment Company Institute* v. *Board of Governors of the Federal Reserve System,* 551 F.2d 1270, 1282 n.13 (D.C. Cir. 1977) (rule may be challenged in such circumstances only by a party with a valid excuse for failing to pursue direct attack).

The other court of appeals to which respondents refer, the Fifth Circuit, has been similarly equivocal. In *Texas* v. *United States,* 730 F.2d 409 (1984), petition for cert. pending, No. 84-1712, the court rejected the government's Hobbs Act jurisdictional objection; but in *RSR Corp.* v. *Donovan,* 747 F.2d 294, 301-302 (1984), the court upheld a similar jurisdictional contention.

Far from being settled questions, the Hobbs Act's jurisdictional limitations are presently a source of substantial uncertainty and considerable litigation. This Court's review is fully warranted.

2. Respondents also contend (Br. in Opp. 3) that this Court lacks jurisdiction over our petition because the government "prevailed on the merits" in the court of appeals. This Court has, of course, recognized in other contexts that jurisdiction "is a matter wholly separate from and independent of the merits." *Construction Laborers* v. *Curry,* 371 U.S. 542, 548 (1963). In this case, the court of appeals' assertion of jurisdiction has a real and continuing adverse impact. The Hobbs Act has been turned on its head. In place of the repose and centralized review the statute prescribes, the court of appeals has substituted a regime in which duplicative challenges can be launched well

after the statutory time limit has expired. The government, accordingly, "retains a stake in the appeal" (*Deposit Guaranty National Bank* v. *Roper,* 445 U.S. 326, 334 (1980)) that satisfies the standards governing this Court's jurisdiction.

Respondents acknowledge (Br. in Opp. 13) that the concern we expressed in our petition that " 'uncertainty will prevail and litigation will abound' " is "indeed real." That is because the incorrect assertion of jurisdiction to review federal agency regulations unnecessarily subjects the government, more so than a private party, to uncertainty in enforcement, compliance, and nationwide uniformity. Cf. *United States* v. *Mendoza,* No. 82-849 (Jan. 10, 1984), slip op. 5, quoting *INS* v. *Hibi,* 414 U.S. 5, 8 (1973) (" 'the Government is not in a position identical to that of a private litigant' "). In these circumstances, not only is it necessary to correct the lower court's misapprehension of the scope of its power to review agency orders, but, as this Court recognized in *Deposit Guaranty National Bank*, and *Electrical Fittings Corp.* v. *Thomas & Betts Co.,* 307 U.S. 241, 242 (1939), certiorari is an appropriate mechanism for instructing the lower courts on the scope of their powers.

Finally, respondents argue unpersuasively that 28 U.S.C. 1254(1) does not authorize our petition despite its plain language permitting "any party" to seek a writ of certiorari. They ignore, however, the clear language of the Hobbs Act, 28 U.S.C. 2350(a) (emphasis added), which allows "[t]he United States, the agency, *or* an aggrieved party" to petition for a writ of certiorari.

For the foregoing reasons, and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted. The Court may wish to consolidate this case with *ICC* v. *Texas,* No. 84-1712, or to hear the cases in tandem.

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